

April 13, 2020

RE: Ocean Dumping: Modification of an Ocean Dredged Material Disposal Site Offshore of Port Everglades, FL, Docket ID No. EPA-R04-OW-2020-0056

I am an Assistant Professor of Law at the University of Oregon School of Law, where I teach Ocean and Coastal Law. I am pleased to submit the following comments on the proposed rule *Modification of an Ocean Dredged Material Disposal Site Offshore of Port Everglades, FL*, Docket ID No. EPA-R04-OW-2020-0056.

The Port Everglades ODMDS is located in Southern Florida within the area of the only barrier reef in the continental US. This barrier reef is home to at least 7 species of corals listed as endangered under the Endangered Species Act. Essential Fish Habitat and Habitat Areas of Particular Concern, under the Magnuson-Stevens Fishery Convention and Management Act, are also in close proximity to the ODMDS. These HAPCs are subsets of EFHs designated as a result of their ecological importance to federally managed species, vulnerability to degradation, or rarity of habitat. The EFHs in the vicinity of the ODMDS include artificial and natural coral and coral reefs, live/hard bottoms, *Sargassum*, and water column; and the HAPCs include hermatypic coral habitat and reefs, hard bottom, and *Sargassum* habitat as well as *Phragmatopoma* reefs and numerous nearshore hard bottom areas. Deepwater hard and soft bottom habitats in close proximity to the ODMDS are also designated as EFH for species managed under the Snapper-Grouper, Golden Crab, Spiny Lobster and Shrimp Fisheries. Species from the Highly Migratory Pelagic Fisheries may also be present in the area. The ODMDS is also in the vicinity of the Florida Keys National Marine Sanctuary.

The proposed rule would expand the existing ODMDS 247% without adequate assessment of the impact of the action on these protected species and habitats. Given the fragility and ecological significance of the areas within and near the ODMDS expansion area, and the requirements of the Marine Protection, Research, and Sanctuaries Act, ESA, Marine Mammal Protection Act, Magnuson-Stevens Fishery Convention and Management Act, and Coastal Zone Management Act, this significant federal action should not proceed absent assessments based on current scientific methodology and current site characteristics.

The proposed rule relies on outdated assessments, some of which are more than 15 years old. Some, if not all, of these assessments do not evaluate the proposed expanded disposal area or the current conditions of the existing or expanded areas. Conclusions about the expanded area are made without reference to supporting data or studies. As a result of these shortcomings, the proposed rule fails to adequately consider the full range of the action's impacts on threatened and endangered species, EFHs, and HAPCs. For example:

- The proposed rule concludes that the general and specific criteria for ODMDS designation and expansion are satisfied based on the 2004 EIS for the ODMDS designation. Incorporation by reference of an assessment that is 16 years old and that considered a disposal site approximately 1/3 the size of the proposed expanded site does not constitute adequate consideration of the required general and specific criteria.
- Consistent with this, the proposed rule concludes that the specific criteria requiring evaluation of "the location in relation to breeding, spawning, nursery, feeding, or passage areas of living

resources in adult or juvenile phases” is satisfied based on the 2004 determination that the **existing** ODMDS is located in exclusive breeding, spawning, nursery, feeding, or passage areas for adult or juvenile phases of living resources. For purposes of the proposed expansion, however, the criteria requires evaluation of the expanded ODMDS.

- With respect to the expanded area, the DEA observes that “[b]reeding, spawning, and feeding activities of fish undoubtedly occurs in the proposed expansion areas.” The DEA concludes that “these activities are not believed to be confined to, or concentrated in, the proposed expansion areas,” and that “[m]ost of the larger species are highly mobile and can avoid the area during a short duration disposal event.” The DEA does not cite any data sources or studies to support these conclusions. **Accordingly, the conclusion that “designation of either alternative for the Port Everglades Harbor ODMDS would only have minor and temporary effects and would not have any long-term adverse effects on the continued existence of fish and wildlife resources” is not adequately supported.**
- The proposed rule concludes that the specific criteria requiring evaluation of “[d]ispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction and velocity” is satisfied based on the 2004 evaluation of the criteria with respect to the existing disposal site. 40 C.F.R. § 228.5 provides in part that “[t]he sizes of the ocean disposal sites will be limited in order to localize for identification and control any immediate adverse impacts.” In 2004, EPA concluded that “there is little possibility for sediment transport from the existing ODMDS, due to Florida current eddies, to impact any resource areas.” The DEA acknowledges, however, that site material has moved beyond the boundary of the site. **Further analysis of impacts beyond the boundary of the proposed expanded disposal site is needed to assess the disposal site criteria and impacts on species and habitats.**
- **Conclusions about the impact of the expanded site on endangered and threatened species and critical habitat are also based on outdated data that fail to consider current conditions and the expansion area, and some of the conclusions do not appear to be supported by any data or studies.** For example, the DEA states that five of the six species of sea turtles in US water that are protected under the ESA can be found in the proposed expansion area, but fails to provide any support for concluding that Green Sea turtles, because they are “agile swimmers,” are capable of avoiding the effects associated with a disposal event at the expanded site.
- **The proposed rule gives inadequate consideration to the impacts on hardbottom, corals, and coral reefs.** The DEA concludes that the proposed expansion area contains 12.85 acres of potential hardbottom. Given the significant losses of endangered South Florida corals that resulted from the failure to accurately estimate the sediment impacts of recent dredging and disposal projects in South Florida marine waters, EPA and USACE have a duty to use current data and studies based on best scientific methods to assess the impacts of this proposed expansion on these listed species and related critical and essential habitats.
- **The proposed rule gives inadequate consideration to the impacts of expansion on numerous marine mammals, including whales, dolphins and seals,** all of which the DEA concludes are likely to be within the expansion area.

Finally, by failing to certify that the expansion is consistent to the maximum extent practicable with the enforceable policies of Florida’s Coastal Zone Management Plan, EPA has failed to follow the requirements of the Coastal Zone Management Act. The CZMA does not allow EPA to rely on its 2004 certification of consistency for this 2020 proposed rule. This makes sense given that the 2020 federal activity (significant expansion of the ODMDS) differs significantly from the 2004 federal activity

(designation of the original ODMDs) and the enforceable policies of Florida's CZMP have changed since 2004.

In summary, the proposed expansion appears to be rushed and inadequately supported. The required considerations are based on old data and analysis based on (1) the original designation area and activities within that area at the time of the original designation and (2) cursory consideration of the impacts to species and habitat. The proposed rule also fails to address the impacts of the expansion on species and habitat outside of the designated area.

Kind regards,

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